DOCKET FILE COPY ORIGINAL

WC 09-133

ORIGINAL

David Cosson
ATTORNEY AT LAW

2154 Wisconsin Ave, N.W.
Washington, D.C. 20007

Telephone (202) 296-8890
Telecopier (202) 296-8893

June 26, 2009

FILED/ACCEPTED
JUN 26 2009
Federal Communications Commission
Office of the Secretary

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Sandwich Isles Communications, Inc.
Petition for Declaratory Ruling

Dear Madam Secretary:

On behalf of Sandwich Isles Communications, Inc. ("Sandwich Isles"), we attach hereto an original and four (4) copies of a Petition for Declaratory Ruling seeking the Commission's prompt review and reversal of a National Exchange Carrier Association ("NECA") determination denying the inclusion of, and settlement on, certain Sandwich Isles costs in the NECA traffic sensitive pool.

Respectfully submitted,

David Cosson

cc: (via hand delivery)
Michael J. Copps, Acting Chairman
Commissioner Jonathan S. Adelstein
Commissioner Robert M. McDowell
Julie A. Veach
Albert Lewis
Jennifer McKee

(via electronic mail)
Regina McNeil, General Counsel, National Exchange Carrier Association

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Sandwich Isles Communications, Inc.	)	
	)	WC Docket No. _________
Petition for Declaratory Ruling	)	

PETITION FOR DECLARATORY RULING OF SANDWICH ISLES COMMUNICATIONS, INC.

Sandwich Isles Communications, Inc. ("Sandwich Isles"), pursuant to Section 1.2 of the Commission's Rules, requests the Commission issue a Declaratory Ruling that certain circuit lease expenses incurred by Sandwich Isles are "used and useful" and direct the National Exchange Carrier Association to accept such costs for inclusion in, and settlement from, its traffic sensitive pool.[1] In support of this request, Sandwich Isles states as follows:

I BACKGROUND

Sandwich Isles provides telephone service to a study area that consists of most of the Hawaiian Home Lands ("HHL"). Sandwich Isles began operations in 1997 and functions as an incumbent local exchange carrier for access charge and universal service purposes pursuant to waivers granted by the Common Carrier Bureau, and its successor,

---

[1] In the *NECA Safeguards Order* the Commission rejected arguments that it was delegating too much authority to NECA because "LECs that disagree with NECA's interpretations of our rules are free to present their arguments to the Commission, either in comments on those [tariff] filings or petitions for declaratory rulings." 10 FCC Rcd 6243, 6260 (1995), para. 44 (citation omitted).

the Wireline Competition Bureau.[2] Sandwich Isles is licensed and obligated to serve the HHL by the Department of Hawaiian Home Lands (DHHL), and is subject to regulation by the Hawaii Public Utilities Commission ("HPUC"), which designated it as an Eligible Telecommunications Carrier. Because the great majority of its study area is in sparsely populated rural areas scattered over six islands in the state of Hawaii, Sandwich Isles requires guaranteed access to reliable transport facilities between the islands.[3]

In the Waiver Order in which it found the public interest would be served by grant of a waiver of the study area freeze, the Commission recognized that Sandwich Isles planned to construct with RUS financing an inter-island transport network to serve the residents of the Hawaiian Home Lands.[4] When RUS rescinded its original approval of loan funds for the network, Sandwich Isles was forced to seek alternative financing.[5] Ultimately financing was obtained for a third party, Paniolo, to construct the network which was then leased to Sandwich Isles.

---

[2] *Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification,* Order, 13 FCC Rcd 2407 (CCB 1998); *GTE Hawaiian Telephone Company, Inc., application for Review of a Decision by the Common Carrier Bureau,* Memorandum Opinion and Order, 19 FCC Rcd 22268 (2004) ("GTE Application for Review Order"); *Sandwich Isles Communications, Inc., Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary and Sections 36.611 and 69.2(hh) of the Commission's Rules,* Order, 20 FCC Rcd 8999 (WCB 2004). *applic. rev. pending.* ("Waiver Order") Sandwich Isles study area consists of all of the 203,000 acres of the HHL, except the small portion which was receiving telephone service from GTE, Hawaiian Telecom's predecessor, in 1997. The excluded portions of the HHL are mainly in the Honolulu area.

[3] Sandwich Isles described the HHL and its relationship with DHHL at length in its 2004 Petition for waiver of the definition of "study area, *see* n.1, *supra.*

[4] Waiver Order at para. 17.

[5] RUS stated that it suspended financing of the inter-island network because of the financial uncertainty created by the Commission GTE Application for Review Order. Although the Commission subsequently adopted the Waiver Order, RUS did not reinstate its funding commitment.

Throughout the process leading up to the Paniolo lease, Sandwich Isles kept NECA fully informed of the specific plans of the planned lease. Although NECA carefully repeated during this process that it would not give formal agreement with the lease expenses until it had reviewed the final form of the lease, and raised many questions about it, the questions focused on such factors as whether their was a cognizable relationship between Sandwich Isles and Paniola and the accounting treatment and did not alert Sandwich Isles that there was a serious probability that the entire lease payments would not be accepted. In fact, NECA accepted the first six months of the lease payment and provided settlements to Sandwich Isles for the period beginning January 1, 2009.

To Sandwich Isles surprise it was notified by NECA on May 5, 2009 that NECA had concluded that the costs for the undersea cable transaction "do not appear to meet the standards of the 'used and useful' doctrine....." and that NECA "may not accept the pooling of Sandwich Isles' anticipated costs including, but not limited to, the lease of undersea cable capacity."[6] Sandwich Isles immediately challenged NECA's conclusion at in-person and telephone conference calls, explaining in detail the reasons why the costs are reasonable under all the circumstances and that there was good reason to expect that the costs allocated to interstate transport, and thus the NECA pool, would be substantially offset by increasing transport revenue over the next few years. NECA has not reversed its position, however. As a result, Sandwich Isles understands that the costs justifying NECA's annual access filing of June 16, 2009 do not include the Sandwich Isles' lease costs and that Sandwich Isles will not receive pool settlements on those costs.

---

6 Letter from James W. Frame, Vice President, Operations, NECA to Alan Pedersen, General Manager, Sandwich Isles, May 5, 2009. The Paniola lease covers both undersea transport facilities and terrestrial transport from the beach manholes to Sandwich Isles central offices.

II SANDWICH ISLES' INTER-ISLAND LEASE COSTS ARE REASONABLE AND SHOULD BE INCLUDED IN ITS TRAFFIC SENSITIVE POOL SETTLEMENTS.

A. Adequate Facilities To Serve The Hawaiian Homelands Are Not Available On Reasonable Terms And Conditions From Alternative Sources.

NECA reached its conclusion that the lease costs were unreasonable in part on the basis of price quotes it received from Pacific Light Net ("PLNI") that purported to provide the same transport capability at considerably less cost. NECA also suggested that Sandwich Isles should continue to lease facilities from Hawaiian Telcom. Assuming, *arguendo,* the accuracy of the price quotes,[7] in neither case would these alternatives provide the necessary capability and service quality required to permit Sandwich Isles to fullfil its service obligations as a designated Eligible Telecommunications Carrier ("ETC") or under its license from the Department of Hawaiian Homelands.

Prior to finalizing the Paniolo lease, Sandwich Isles had itself obtained price quotes from PLNI but not did pursue that option for two valid reasons. First, the price quotes it received were considerable higher than those subsequently given to NECA. Second, Sandwich Isles had legitimate concerns regarding the service quality and reliability of PLNI's facilities. For example, one of its inter-island links had been out of service for several months. Similarly, Sandwich Isles evaluated continued leasing of

[7] The price comparison was apparently only for the undersea links and did not include the substantial terrestrial facilities in the leased network.

facilities from Hawaiian Telcom, but determined that those facilities were obsolete, and had serious capacity constraints,[8]

B. The Unique Circumstances in Hawaii Result in Exceptionally High Initial Costs for Inter-Island Transport Networks

Sandwich Isles serves upward of 69 non-contiguous areas scattered across six volcanic islands separated by ocean channels almost two miles deep in some locations. Serving these areas requires overcoming extreme construction challenges with commensurate high cost. Among the requirements are preparation of environmental studies, multiple governmental agency approvals, cultural consideration and coordination efforts, construction mobilization planning and shipment of equipment and materials to the islands 2600 miles from the mainland, placing underground fiber optic facilities in sand, volcanic rock, across vast ravines, etc.

Undersea facilities also create exceptional challenges, because cost and environmental concerns simply do not allow essential facilities to be constructed based solely on current demand levels because augmentation of those facilities it not possible in the short run, rather they must be constructed to meet potential demand for at least 20 years or more. In this context it must be noted that the major costs of constructing undersea cable are incurred regardless of the number of fibers in the cable, and that adding fibers beyond current demand only increases costs by a few percentage points.

C. NECA's Arbitrary Decision to Disallow Sandwich Isles' Lease Cost Was Made Without Providing Sandwich Isles Due Process.

---

[8] Hawaiian Telcom is currently in bankruptcy, and has been denied a video franchise by the state because it does not have the capacity to serve all the islands with video.

NECA's May 5 statement to Sandwich Isles included the suggestion that Sandwich Isles consider withdrawing from the pool and filing its own tariff. At that point in time the June 16 tariff filing date was slightly over six weeks away, which did not provide sufficient time to prepare a tariff and accompanying justification. In any event, Sandwich Isles did not and does not want to leave the Traffic Sensitive Pool, but it does assert that NECA has an obligation to provide its members with adequate notice of adverse decisions that could have material adverse consequences. In particular, decisions to disallow pool costs are arbitrary and capricious if they are not made after adequate opportunity for the pool member to justify the costs and/or make appropriate adjustments. In this case, Sandwich Isles did not have such adequate opportunity.

Despite Sandwich Isles' diligent efforts beginning in 2000 to coordinate with NECA with respect to its plans and potential costs for an inter-island network, it was not until May 5 of this year that Sandwich Isles was notified that the costs "may not be included" in the 2009 tariff filing and subsequent pool settlements. Prior to that date there was extensive communications, including a May 7, 2008 response to NECA questions with respect to its concerns regarding the cost and capacity of the lease. Nevertheless, the specific conclusion that the lease costs were not "used and useful" and NECA comparison of the lease costs with PLNI and Hawaiian Telcom facilities was not communicated to Sandwich Isles until the May 5 letter and the subsequent meeting.

V CONCLUSION—RELIEF REQUESTED

Sandwich Isles respectfully requests that after appropriate proceedings in which Sandwich Isles could present a detailed justification, the Commission find and declare:

1. That the Sandwich Isles lease costs in question are used and useful in the provision of interstate service.

2. That NECA be directed to accept the costs for pooling and settlement purposes, including such tariff revisions as may be required.

3. That in any event, NECA be directed to continue Sandwich Isles settlements based on its submitted cost study pending resolution of this proceeding.

Respectfully submitted

Sandwich Isles Communications, Inc.

By/ David Cosson
Its Attorney

2154 Wisconsin Ave., N.W.
Washington, D.C. 20007
202 333 5275

June 26, 2009